



# PUBLIC NOTICE

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## WIRELESS TELECOMMUNICATIONS BUREAU EXEMPTS CERTAIN COMMUNICATIONS FROM EX PARTE PERMIT-BUT-DISCLOSE REQUIREMENTS

### WT Docket No. 19-348

With this Public Notice, pursuant to the Commission's rules, the Wireless Telecommunications Bureau (Bureau) exempts certain communications from the *ex parte* permit-but-disclose requirements in WT Docket No. 19-348.<sup>1</sup> Specifically, any oral or written *ex parte* presentations made to any Commission staff in connection with such staff's participation in the National Spectrum Consortium's Partnering on Advancing Trusted and Holistic Spectrum Solutions (PATHSS) Task Group is exempt from the permit-but-disclose requirements contained in the Commission's rules, subject to the procedure discussed below for disclosing and affording the public an opportunity to comment on any information upon which the Commission may seek to rely in the pending proceedings.

The Commission has two pending permit-but-disclose proceedings in WT Docket No. 19-348 that address issues in the 3.1-3.55 GHz band. First, in the *Facilitating Shared Use in the 3100-3550 MHz Band* proceeding, the Commission sought comment broadly on whether the 3.1-3.45 GHz band could be repurposed to permit more expansive non-federal use on that band.<sup>2</sup> Second, three petitions for reconsideration were filed in the docket requesting reconsideration of certain rules that the Commission adopted for the 3.45-3.55 GHz portion of the band.<sup>3</sup> These proceedings remain pending before the Commission.

After these proceedings were initiated, Congress passed the Infrastructure Investment and Jobs Act.<sup>4</sup> As part of the Infrastructure Act, Congress directed the Department of Defense (DoD) to study the

<sup>1</sup> See 47 CFR §§ 1.1200 *et seq.*; *Facilitating Shared Use in the 3100-3550 MHz Band, Report and Order and Further Notice of Proposed Rulemaking*, 35 FCC Rcd 11078, 11116, para. 111 (2020) (*3.45 GHz R&O and FNPRM*) (noting that the proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules).

<sup>2</sup> *3.45 GHz R&O and FNPRM*, 35 FCC Rcd at 11093, para. 44 ("While NTIA has identified the uppermost 100 megahertz of the 3.1-3.55 GHz band for commercial wireless operations, consistent with the MOBILE NOW Act, we seek comment on whether such operations are feasible below 3.45 GHz. In particular, we ask commenters to provide input on the feasibility of reallocating the 100 megahertz of spectrum between 3.35 GHz and 3.45 GHz for commercial wireless service at the same power levels that we propose for the 3.45-3.55 GHz band throughout the contiguous United States and on what additional steps would be necessary to make such use feasible. We seek specific comment on whether clearing this spectrum of federal operations for exclusive commercial use is feasible, what steps need to be taken, what the timeline for such clearing would be, and whether limited sharing through geographic coordination zones could speed making this spectrum available to the commercial market.").

<sup>3</sup> *Petitions for Reconsideration of Action in Proceedings*, Public Notice, Report No. 3174 (May 19, 2021).

<sup>4</sup> See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 90008 (2021) (codified at 47 U.S.C. § 921 note) (Infrastructure Act).

3.1-3.45 GHz band in order to identify spectrum for reallocation for shared use and auction.<sup>5</sup> Congress also directed that, “[n]ot later than 21 months after the date of [its] enactment, . . . the Secretary of Commerce, in coordination with the Secretary of Defense, the Director of the Office of the Science and Technology Policy, and relevant congressional committees, shall—(i) determine which frequencies of electromagnetic spectrum in the covered band could be made available on a shared basis between Federal use and non-Federal commercial licensed use, subject to flexible-use service rules; and (ii) submit to the President and the Commission a report that identifies the frequencies determined appropriate under clause (i).”<sup>6</sup> As a result of the report’s identification of 350 megahertz for shared use, “[n]ot earlier than November 30, 2024, the Commission, in consultation with the Assistant Secretary of Commerce for Communications and Information, shall begin a system of competitive bidding under section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)) to grant new licenses for the spectrum identified . . . .”<sup>7</sup>

On October 27, 2021, the National Spectrum Consortium announced the launch of its PATHSS Task Group, an industry group tasked with collaborating with the DoD “to explore sharing solutions to make more mid-band spectrum available for commercial 5G, specifically in 3.1-3.45 GHz.”<sup>8</sup> The group will allow industry and the DoD to share proprietary, sensitive and classified information on current and projected military and commercial requirements in these bands.<sup>9</sup> One or more Commission staff will participate in the PATHSS Task Group.

We determine that there is little substantive overlap in what is currently being considered in the different forums. First, the subject matter of the pending reconsideration requests is the 3.45-3.55 GHz band, whereas the PATHSS Task Group is focused solely on the 3.1-3.45 GHz band. Second, regarding the 3.1-3.45 GHz band, we expect the PATHSS Task Group to involve detailed, technical discussions intended to generate use cases to facilitate spectrum sharing outcomes in the 3.1-3.45 GHz band.<sup>10</sup> By comparison, the comments sought by the Commission in the *3.45 GHz FNPRM* were far broader than the focused inquiry of the PATHSS Task Group. Given the minimal substantive overlap between the PATHSS Task Group’s work and the pending proceedings, we find that it is in the public interest for the Bureau to exempt the work of the PATHSS Task Group and any related communications made in the

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<sup>5</sup> Infrastructure Act § 90008(b)(1)(A). The Infrastructure Act’s requirements do not extend to the 3.45-3.55 MHz band.

<sup>6</sup> *Id.* § 90008(b)(2)(A).

<sup>7</sup> *Id.* § 90008(b)(3).

<sup>8</sup> *National Spectrum Consortium Launches PATHSS Task Group to Explore 5G Spectrum Sharing* (Oct. 27, 2021), <https://t.co/zseVuNX3Uz> (*National Spectrum Consortium Press Release*). According to its website, the National Spectrum Consortium “provides the Government direct access to over 440 members of U.S. industry and academia who work with systems, sub-systems, components and the enabling technologies related to the use of the electromagnetic spectrum or the information that rides on it” and provides such services to DoD as a contractor. See National Spectrum Consortium, *What We Do*, <https://www.nationalspectrumconsortium.org/about-us/>; National Spectrum Consortium, *How We Work – the OTA*, <https://www.nationalspectrumconsortium.org/how-we-work-the-ota/>.

<sup>9</sup> *National Spectrum Consortium Press Release; Facilitating Shared Use of the 3100-3550 MHz Band*, Second Report and Order, Order on Reconsideration, and Order of Proposed Modification, 36 FCC Rcd 5987 (2021).

<sup>10</sup> See *National Spectrum Consortium Press Release*; see also National Spectrum Consortium, *NSC Working Groups*, <https://www.nationalspectrumconsortium.org/working-groups/> (NSC Working Groups are “collaborative platforms” that “bring[] together the single largest pool of scientists and engineers who understand the technical details relating to spectrum and spectrum-dependent systems, and their relationship to new and emerging technology in the 5G and beyond ecosystem, across both commercial and military applications”).

context of the Task Group from the permit-but-disclose requirements of the pending proceedings.<sup>11</sup> We find that such an exemption will facilitate the free exchange of exploratory ideas among Task Group participants working toward the important goal of assessing how to make 350 megahertz of spectrum available by facilitating sharing in the 3.1-3.45 GHz band based on the potential use cases for federal and non-federal operations and how they might co-exist, and that according exempt status to such communications is in the public interest.

We emphasize, however, that if the Commission were to rely on any information in any presentation made through the PATHSS Task Group as part of its consideration of the pending proceedings in WT Docket No. 19-348, the Commission would place such information in the record and provide the public an opportunity to comment on such information. Moreover, to the extent the DoD report prepared in light of the work of the PATHSS Task Group is filed with the Commission, it will be made available to the public and placed in the record of any relevant Commission dockets, so that it will be available for comment. Both information provided to the PATHSS Task Group on which the FCC relies in the above-mentioned proceedings and the potential subsequent inclusion in the record of the resulting DoD report are subject to the application of any relevant protective order or other safeguards for confidential information of any kind.<sup>12</sup> We find that this approach, which is analogous to the process followed for certain other exempt communications in permit-but-disclose proceedings, will help to develop a fulsome record for the Commission's consideration in the pending permit-but-disclose proceedings.<sup>13</sup> Further, we remind interested stakeholders that in all other regards, the pending proceedings remain permit-but-disclose, and any presentations to the Commission directed to the merits or outcomes of those pending proceedings, including the above topics of whether spectrum at 3.1-3.45 GHz generally may be repurposed and any disposition of pending petitions for reconsideration as to the Commission's rules for operations in the 3.45-3.55 GHz band, must comply with the Commission's *ex parte* rules.

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<sup>11</sup> See 47 CFR § 1.1200(a) ("Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice.").

<sup>12</sup> We observe that the Task Group's communications with the Commission staff prior to such a development are similar to those directed at the Commission in connection with a petition for rulemaking or Notice of Inquiry; such communications would typically be treated as exempt under the Commission's *ex parte* rules. See *id.* § 1.1204(b)(1)-(2).

<sup>13</sup> See *id.* §§ 1.1204(a)(10)(iii), (v), 1.1206(b).